



March 14, 2019

The Honorable Elijah E. Cummings  
Chairman  
Committee on Oversight and Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Cummings:

The Freedom of Information Act (FOIA) was enacted in 1966 to provide the American public access to federal agency records, thereby affording Americans a window into the government so that they might better understand how their government works, and for whom it works. In the 50-plus years since FOIA was enacted, it has opened up countless records to important public scrutiny, providing citizens, journalists, and others the ability to shine a much-needed light on the inner-workings of the federal government. The statute embodies the fundamental principle that the government works for the people.

However, FOIA's efficacy as a tool for transparency has started to fade in the years since its passage. Under-resourced FOIA processing units, excessive delays, liberal use of exemptions and redactions, and limited responsiveness by certain federal agencies have collectively undermined FOIA's promise of the timely access to government records necessary to ensure an informed citizenry. The FOIA Improvement Act of 2016 addressed several challenges, including by establishing a presumption of disclosure. Unfortunately, three years after the law's passage, the need for additional reform remains clear.

American Oversight is a nonpartisan organization that specializes in using FOIA requests to promote government transparency and to hold government officials accountable. In our experience – working with agencies across the federal government and over time – there are a few common agency practices that impair FOIA's ability to serve its central purpose of making government records promptly available. Our experience likely has been shared by requesters across the country. Reform of a few aspects of FOIA could serve to prevent agencies from adopting these delay tactics while still protecting important governmental interests.

For example, agencies routinely abuse the requirement under FOIA that requests be "reasonably described." Some agencies marshal this provision to reject FOIA requests seeking readily identifiable records, such as emails between two individuals over a specified date range, when the requested records are not further limited to a specific topic or by specific key words.<sup>1</sup>

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Neither the FOIA statute, its implementing regulations, nor case law require requests to be so limited. Instead, agencies are obligated to process FOIA requests so long as a professional employee of the agency can understand what records are sought and can locate them with a reasonable amount of effort. This is the case with requests for email that can be readily identified using basic search criteria in any modern email program. When agencies demand specificity beyond what the law actually requires, it frustrates transparency and violates FOIA.

In addition, agencies routinely delay responding to FOIA requests by engaging in interagency “consultation” or by “referring” records to another agency after months or years of processing. In light of the FOIA’s statutory deadline, the black hole of interagency consultation – which is generally not covered by those deadlines – is a significant source of delay that appears at odds with the purpose of FOIA. Likewise, referring FOIA requests or documents to other agencies after months or even years of processing by the original agency serves as a loophole for compliance that is difficult for requesters to combat in court or through direct advocacy. When agencies can point fingers at each other to avoid complying with FOIA requests in a timely manner, agencies escape accountability.

These agency tactics to avoid FOIA accountability are compounded significantly by the limited resource agencies commit to FOIA processing. This issue begins with limited capabilities in agency information systems, making it all but impossible for agency staff to effectively search and process FOIA requests in a timely manner. In 2019, searching agency emails should be a streamlined process. It frequently is not. More fundamentally, agencies simply fail to allocate adequate resources to meet agency obligations under FOIA. Across the federal government, agency responses to FOIA requests are routinely delayed because agencies have chosen, whether by conscious design or neglect, not to allocate sufficient agency resources to FOIA processing to meet existing or predictable FOIA demand, resulting in growing backlogs and increasingly delayed responses to FOIA requests. These delays prevent timely disclosure of records regarding agency operations and thereby frustrate FOIA’s purpose of providing accountability for government actions and facilitating democratic participation by ensuring an informed citizenry. Agency budgets reflect their priorities; FOIA hasn’t been one of them.

The time has come for Congress to re-examine FOIA and amend the law to improve FOIA processing to ensure the American people are able to gain access to the records to which they are entitled. The growing backlogs and increasing delays across the federal government over the past three years illustrate that the 2016 FOIA amendments, vigorous congressional oversight, and repeated admonitions to devote resources to improve FOIA processing will not suffice to ensure agencies devote adequate resources to meet their legal obligations under FOIA.<sup>2</sup>

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From its experience requesting records under FOIA, American Oversight has identified three areas where Congress might amend FOIA to ensure better and more timely access to agency records and thus increased transparency regarding government operations:

- Amending Section 552(a)(3) to make express that a record is “reasonably described,” when a professional employee of the agency can understand what record is sought and can locate the record, and specifying explicitly that for a request to be “reasonably described,” a requester need not limit their request to specific subject matters, topics, key terms, or specific custodians.
- Amending Section 552(a)(6)(A) and (B) to limit the time an agency may withhold documents for consultation with another agency, agency component, or other executive branch entity. Any consultation should be limited to 20 working days, and the consulted agency, component, or entity should be presumed to consent to release if it fails to respond within this deadline. Similarly, in order to ensure that agencies process referred records in a timely fashion, agencies or components receiving them should process them in 20 working days or face meaningful penalties, such as liquidated damages to frustrated requesters. To ensure that governmental interests are fully protected, the amendment could provide that either of these deadlines might be extended once for an additional 90 calendar days upon determination by the agency head (and only the agency head) that additional time is needed.
- Ensure appropriate resourcing of agency FOIA processing, including developing agency information systems to include search and processing functions to facilitate the ease of FOIA response efforts, and by mandating that agencies allocate an appropriate proportion of their budget to FOIA processing. Agencies should face real budgetary consequence if an adequate proportion of their spending, or their full-time equivalent employees, have not been committed to meeting their obligation to provide timely access to records under FOIA.

We believe these changes would go far in improving the ability of requesters to effectively receive documents, would clarify the requirements for agency FOIA personnel, and would ultimately result in greater transparency for all. We would be happy to discuss any of these suggestions with your staff, and look forward to working together to ensure that the next 50 years of FOIA will be as robust and transparent as possible.

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Sincerely,

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Austin R. Evers  
Executive Director  
American Oversight

Cc:

Senator Patrick Leahy  
Senator Charles Grassley  
Senator John Cornyn



March 14, 2019

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United States Senate  
517 Hart Senate Office Building  
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Austin R. Evers  
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Cc:

Senator Patrick J. Leahy  
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